IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPEAL NO. 1500 of 2003

Sidhu Sukhdeo Waghmare .. Appellant

versus

State of Maharashtra .. Respondent

...

Mr.R.S. Pawaskar for the appellant.

Mr.D.P. Adsule, APP for the State.

CORAM : V.M. KANADE, J

DATED : 13th December 2004

ORAL JUDGEMENT :-

1. The appellant is challenging the judgement and order passed by 3rd Adhoc Addl. Sessions Judge at Sangli in Sessions Case no.133 of 2001. By the said judgement and order dated 20.11.2003, the appellant

accused was convicted of the offences punishable u/s.376 of the IPC andd was sentenced to suffer RI for 10 years and to pay a fine of Rs.2,000/- and in default to suffer RI for six months. The accused was further convicted for having committed an offence u/s.366 r/w sec.34 and sentenced to suffer RI for five years and a fine of Rs.1,00/- was imposed and in default to suffer RI for three months. The accused no.1 was further convicted u/s.363 r/w sec.34 of the IPC and sentenced to suffer RI for three years and fine of Rs.500/- and in default to suffer RI for three months. The accused no.2 was convicted for offence punishable u/s.366, 363 r/w sec.34 of the IPC and sentenced to suffer RI for five years and three years respectively and to pay a fine of Rs.100/- and Rs.500/- on each count and in default to suffer RI for six months and three months respectively.

2. The prosecution case is that the accused used to visit the house of Bayakka PW no.2. There, he met Sangeeta PW no.5. The prosecution case is that the accused tried to seduce the prosecutrix and tried to persuade her to elope with him. However, the prosecutrix did not pay any heed to the sexual overtorge of the accused. The prosecution case is

that the accused no.2 used to instigate the prosecutrix to have a love affair with Siddhu, accused no.1. When Bayakka came to know about these facts, she did not allow the prosecutrix to go out of the house.

3. The prosecution case is that on 16th May 2001 on one occasion, the prosecutrix was allowed to leave the house to graze she buffaloes. At 12.30 p.m. when Bayakka returned home, she found that the prosecutrix was not in the house. She also came to know that an amount of Rs.10,00/- was missing. She therefore, suspected that the accused had induced and kidnapped the prosecutrix. She therefore went to the police station on 17th May 2001 and lodged the FIR. Accordingly, an offence was registered u/s.363, 366 r/w 34 of the IPC. The prosecution case is that on 16th May 2001 when the prosecutrix was alone in the house, the accused no.1 came to her house with accused no.2 and accused no.3 and accused no.1 seduced the prosecutrix to leave the house and take with her an amount of Rs.8,000/- out of Rs.10,000/- which was in the house. Accordingly, prosecutrix was taken to the S.T. stand and from there she was taken to Sangli in the S.T. bus at Sangli. She was taken to a hair

dresser and then to a movie and in the evening, the accused along with the prosecutrix went to Pritam Lodge where accused no.1 had sexual intercourse with the prosecutrix on two occasions. He thereafter took the prosecutrix to the house of his uncle. On the same day, the mother of accused no.1 informed the mother of the prosecutrix that the accused no.1 had taken the prosecutrix to Jath. Thereafter, the statement of the prosecutrix was recorded on 19th May 2001. She was examined by Dr.kamble and thereafter an offence u/s.376 was registered and the accused were arrested. The trial Court on the basis of the evidence adduced by the prosecution convicted the accused nos.1 and 2.

4. Against the said judgement and order, the present appeal has been preferred.

5. The first question which falls for consideration is whether the girl is a minor. The prosecution has examined PW no.11 Atmaram Ghatage who is the head master of Vidya Mandir High School, Jath where the prosecutrix was studying. He has produced the original register and from the said register, he has produced School Leaving Certificate of the

prosecutrix Sangeeta where her birth date is shown as 1th June 1988. Xerox copy of the register after it is verified is exhibited at Exhibit-15. In the cross-examination he has admitted that the police did not record his statement and that the police did not collect the copy of the School Leaving Certificate from him. He has admitted that the name of the School is not mentioned in the register. He has further admitted that it is not the first entry of the prosecutrix when she took admission in the School. He has stated that initially the prosecutrix had taken admission in Zilla Parishad Marathi School and thereafter she had taken admission in this School. It is difficult to rely on the evidence of this witness. It is admitted position that the name of this witness is not mentioned in the charge-sheet by the prosecution. His previous statement has not been recorded during investigation. The police also have not taken copy of the school leaving certificate from this witness. Similarly, the police also have not taken the school leaving certificate of the prosecutrix from the Zilla Parishad Marathi School no.1 where she was initially admitted. It was the duty of the prosecution to have obtained an order of the Court u/s.173(a) and ought to have recorded his

statement and made the copy of the same available to the accused. However, without doing so, this witness was examined after the examination of Investigating Officer had been completed. Even otherwise, the xerox copies of the school register which is produced by this witness also does not inspire confidence. The name of the school is not mentioned in the said general register. It is difficult to accept that the register in question belongs to Vidya Mandir High School, Jath. Apart from this evidence, there is no other evidence to show that the age of the prosecutrix was below 16 years. The doctor has not performed ossification test. The mother of the prosecutrix PW no.2 Bayakka also has not stated the date of birth of the prosecutrix nor has she stated that she was less than 16 years of age when the alleged offence was taken place. The medical officer PW no.4 Dr.Koli also has not stated in his evidence that he had taken ossification test of the girl. PW no.5 Sangeeta sister of the prosecutrix also has not stated in her evidence that prosecutrix was a minor. Thus, in my view, the prosecution has failed to prove that the prosecutrix was a minor below 16 years of age. The only evidence regarding her age has been given by Dr.Prakash Kamble PW no.7 who has stated that

according to him, she was 15 years of age. However, in the cross-examination he has admitted that he had not taken the ossification test. Thus, in my view, prosecution has miserably failed to prove that the prosecutrix was a minor below 16 years of age. PW no.11 Head master possible was examined to fill up the lacunae in the prosecution case though his name does not figure in the list of witnesses and though his statement was not recorded after the charge-sheet was filed after getting permission of the Court u/s.173(a). Neither the mother of the prosecutrix nor the prosecutrix have stated that she was a minor below 16 years of age.

6. The second question which falls for consideration is whether the accused had committed an offence u/s.363, 366 and 376 of the IPC. From the evidence of PW no.5, the prosecutrix who is the sole witness examined by the prosecution to prove the charge of kidnapping and rape. It is difficult to accept her case that she was forcibly taken by the accused or that the accused no.1 had committed rape without her consent. The prosecutrix has stated that the accused had come to her house and that he had forced her to take an amount of Rs.8,000/- and

thereafter she was forced to sit in the jeep where she was brought to the S.T. bus depot from which place she was taken to Sangli by bus. Thereafter, she was taken to a hair cutting saloon and after her hair was cut, she was taken to a theatre where they saw a movie. Her case is that thereafter, she was taken to a lodge and the accused had sexual intercourse with her after her clothes were removed. According to her, she was thereafter taken to the house of the uncle of the accused and from that place, the mother and maternal uncle of the accused took her to her mother and then the matter was reported to the police. From her evidence, it cannot be believed that girl was forcible taken from her house to the S.T.stand and from the S.T.stand she was taken to Sangli where she spent the day with the accused, had even seen a movie, had a hair cut and stayed at the hotel. It is difficult to accept that all this was done without her consent. The accused also had taken the girl to his uncle from which place his mother and uncle had taken the girl back to her house. The story which emerges from her statement is that the accused nos.1 and 2 had gone to Sangli with an intention of getting married. Otherwise, there was no reason for the accused no.1 to have taken the girl to his uncle’s house. In my view

therefore, the case of abduction and kidnapping is not made out by the prosecution. In the present case, since the age of the girl is not proved by the prosecution, it cannot be said that she was a minor and below 15 years of age. The doctor who had examined her had stated that she was habituated to sexual intercourse and no injuries were found on her person or on her private parts. The medical evidence also does not support the prosecution case regarding forcible intercourse. So far as the age of the girl is concerned as stated hereinabove, it is difficult to accept the prosecution case that she was below 16 years of age.

7. So far as the accused no.2 is concerned, the only evidence against him is the testimony of the prosecutrix who has stated that accused no.2 had instigated her to elope with the accused no.1 and had forcibly taken her in a jeep in the S.T. stand. I have already given the reasons as to why the theory of kidnapping cannot be accepted. Even otherwise, the only role attributed to accused no.2 and absconding accused no.3 is that they had accompanied the accused no.1 and the prosecutrix to the ST bus depot from which place the accused no.1 and the prosecutrix had

gone to Sangli by bus. Thus, in my view, the prosecution has not proved beyond reasonable doubt that the accused no.2 had committed offence of 366, 363 r/w sec.34 of the IPC. He is therefore, acquitted of the said offence.

8. In the result, appeal is allowed. The accused nos.1 and 2 are acquitted for the offence punishable u/s.376, 363, 366 r/w sec.34 of the IPC. The appellant be released forthwith unless they are otherwise required in any other offences. Bailbonds of accused no.2 to stand cancelled.

V.M.KANADE, J